In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 422

VIRGIL O. PLATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Northern District of Illinois, of violating the federal counterfeiting statutes and was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. A; 361 F. 2d 958).

1. Petitioner's primary contention is that this Court should overrule the settled doctrine that when the defendant takes the stand his credibility may be

impeached by proof of a prior criminal conviction, regardless of whether he has affirmatively placed his character in issue. See, *e.g.*, *United States* v. *Comi*, 336 F. 2d 856, 861 (C.A. 4), certiorari denied, 379 U.S. 992; *Schwab* v. *United States*, 327 F. 2d 11, 17 (C.A. 8); *Taylor* v. *United States*, 279 F. 2d 10, 12 (C.A. 5); *United States* v. *Howell*, 240 F. 2d 149, 158 (C.A. 3). Certainly, there is no occasion to re-examine that principle in this case.

Here, petitioner clearly put his character in issue as part of his defense. He called five character witnesses, who had known him from five to sixteen years and testified that he had a good reputation for honesty and integrity (A. 50-51).[1] None of the authorities relied on by petitioner suggest that, in these circumstances, impeachment by prior convictions is improper. See *Michelson* v. *United States*, 335 U.S. 469. Moreover, petitioner did not advance his present contention in the trial court. His sole objection was that, since probation is not a "record of finality", the conviction on which he was sentenced to probation[2] is not a "provable record" (A. 51-53).

The rule applied here is quite different, both in application and in effect, from the rule, involved in four

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[1] "A." refers to the appendix to petitioner's brief in the court of appeals, "Tr." refers to the transcript of the trial and "S. Tr." refers to the transcript of the hearing on petitioner's motion to suppress.

[2] Petitioner was convicted in 1954, on his plea of guilty, to burglary and assault with intent to commit murder and was sentenced to six months' imprisonment and five years' probation.

cases awaiting argument in this Court,[3] that the jury may be informed of prior convictions in habitual offender cases. See *Lane* v. *Warden*, 320 F. 2d 179, 186 (C.A. 4). As this Court stated in *Michelson*, *supra*, at 479, "while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proofs to tests of credibility designed to prevent him from profiting by a mere parade of partisans."

2. At trial, a federal agent testified that, while in custody, petitioner identified the name "Reidelberger" written on a card in petitioner's possession as that of a "friend and customer" (A. 26);[4] also, counterfeiting paraphernalia discovered in a search of petitioner's place of business were introduced in evidence. Petitioner's contention (Pet. 10-11) that this statement and these materials were inadmissible is, as the courts below held, without merit.

Petitioner was arrested at his place of business at approximately 11:45 a.m. by Secret Service agents and brought to the Secret Service office. He was advised that he was arrested for counterfeiting, that any statement he made could be used against him and that he was entitled to counsel (A. 12, 15, 62-63). After petitioner asked to speak with his company's lawyer, the agents twice telephoned the lawyer but

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[3] *Howard* v. *Texas*, No. 6; *Spencer* v. *Texas*, No. 68; *Bell* v. *Texas*, No. 69; *Reed* v. *Beto*, No. 70.

[4] Other testimony connected petitioner with Reidelberger in the passing of counterfeit money.

were unable to reach him (Tr. 20-21). At about 2:00 p.m., petitioner was asked whether he was willing to sign a consent to a search of his printing shop in order to save the trouble of obtaining a search warrant. He agreed, saying: "Yes, you can search my house, my car and everything" (S. Tr. 42). At the hearing on a motion to suppress, petitioner said that he consented to the search because he believed that such a search would produce no evidence and he wanted to get out of custody (S. Tr. 12-13).

The courts below properly held that petitioner's consent to the search of his office was given voluntarily. As the trial court observed, petitioner's own testimony indicated "that he at that time was making a serious effort to convince the agents that he was fully cooperating with their investigation and that he knew what he was doing" (S. Tr. 67-68).

Petitioner's claim that his consent was invalid and his statement about Reidelberger was inadmissible because he did not have the assistance of counsel was properly rejected. Unlike the situation in *Escobedo* v. *Illinois*, 378 U.S. 478, where there was no warning as to the right to remain silent and the defendant's request to see his attorney was denied, petitioner was fully apprised of his rights and a good faith effort was made on two occasions to obtain the particular attorney whom petitioner had requested. There is no claim that petitioner's actions were not otherwise voluntary. Since this case was tried before the decision in *Miranda* v. *Arizona*, 384 U.S. 436, its guidelines

are inapplicable. See *Johnson* v. *New Jersey*, 384 U.S. 719.[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] Petitioner's suggestion (Pet. 10-11) that the rule in *Mallory* v. *United States*, 354 U.S. 449, was violated in this case comes too late. See *United States* v. *Indiviglio*, 352 F.2d 276 (C.A. 2), certiorari denied, 383 U.S. 907. Since he did not raise this objection in the trial court (see A. 25; Tr. 153-155, 164) the facts relevant to a determination of this question do not appear in the record. Moreover, even if the court had erred in admitting petitioner's brief remark that Reidelberger was a "friend and customer," the error was *de minimis*.

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